

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

05 10735 RGS

STEPHEN H. OLESKEY,

ON BEHALF OF GUANTANAMO INTERNEES
LAKHDAR BOUMEDIENE,
MOHAMED NECHLA, MUSTAFA AIT IDIR,
SABER LAHMAR, HADJ BOUDELLA,
AND BELKACEM BENSAYAH,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
DEFENSE AND UNITED STATES
DEPARTMENT OF JUSTICE,

Defendants.

MAGISTRATE JUDGE LTS

Civil Action No. _____

COMPLAINT

RECEIPT # 63510
AMOUNT \$ 250
SUMMONS ISSUED YES
LOCAL RULE 4.1 YES
WAIVER FORM _____
MCF ISSUED _____
BY DPT. CLK. FILE
DATE 4-13-05

PRELIMINARY STATEMENT

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, seeking an order requiring the Defendants, Department of Defense ("DOD"), Department of Justice ("DOJ"), and their components, to immediately produce agency records requested by the Plaintiff.

2. On September 28, 2004, Plaintiff submitted his initial FOIA request ("the Request") to the Defendants. The Request was submitted on behalf of six men interned at the United States Naval Base, Guantanamo Bay, Cuba ("Guantanamo"): Lakhdar Boumediene, Mohamed Nechla (also known as Mohammed Nechle), Mustafa Ait Idir, Saber Lahmar, Hadj Boudella, and Belkacem Bensayah (also known as Bensayah Belkacem) (collectively, "Requesters"). See Attachment A.

3. The Request sought records pertaining to the ongoing internment of Requesters, how Requesters came into the custody of the United States, and their treatment since U.S. forces seized them – including records regarding health, interrogations, and physical coercion, torture or punishment of any or all Requesters.

4. Numerous news stories have documented religious persecution, torture, and abuses of internees held at Guantanamo by agents of the United States Government (“Government”) and instances of extraordinary rendition of detainees to countries known to use torture, such as, Egypt and Syria. Documented torture at Guantanamo has included physical coercion, sensory manipulation, sleep manipulation, short-shackling, exposure to extreme temperatures, and denial of medical treatment. Some of these practices were known to Plaintiff in September. As a result, Plaintiff asked that the Request receive expedited processing. More recently, reports of Government investigations into alleged torture and abuses and Plaintiff’s interviews of Requesters in Guantanamo confirm that one or more of Requesters has suffered such forms of torture at Guantanamo. This more recent information also confirms the importance of the initial Request and the need for an expedited response to it.

5. Defendants have failed to release even a single record to the Plaintiff. Although the DOD granted Plaintiff’s request for expedited processing in October 2004, the DOD has not released any records to Plaintiff and has failed to expeditiously process the Request. The DOJ has neither granted nor denied the request for expedited processing and also has failed to produce responsive records.

6. To enforce the Plaintiff’s right to gather information on behalf of Requesters, who are otherwise without the ability to access public information and may be subjected to abusive

practices during their ongoing, indefinite, and illegal internment at Guantanamo, Plaintiff seeks an order requiring Defendants to immediately process the Request and to release all records that have been unlawfully withheld.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action and these parties pursuant to 5 U.S.C. § 552 (a)(4)(B) and 552(a)(6)(E)(iii). This Court also has jurisdiction over this action pursuant to 5 U.S.C. § 701-706 (APA) and 28 U.S.C. § 1331 (federal question jurisdiction). Venue lies in this district pursuant to 5 U.S.C. § 552 (a)(4)(A) and (B).

PARTIES

8. Plaintiff Stephen H. Oleskey resides and has his principal place of business in this judicial district. He is an attorney duly licensed to practice law in the Commonwealth of Massachusetts and is a partner in the firm of Wilmer Cutler Pickering Hale and Dorr LLP, located at 60 State Street, Boston, 02109.

9. Defendant DOD is a Department of the Executive Branch of the U.S. Government and is an agency within the meaning of 5 U.S.C. § 552(f)(1).

10. Defendant DOJ is a Department of the Executive Branch of the U.S. Government and is an agency within the meaning of 5 U.S.C. § 552(f)(1).

FACTS

I. INTERNMENT OF REQUESTERS BY THE U.S. MILITARY AT GUANTANAMO AND REPORTED TORTURE AND ABUSES OF INTERNEES

11. Requesters are six Algerian-born residents of Bosnia and Herzegovina who were seized by the U.S. military on or about January 18, 2002 in Sarajevo, Bosnia and Herzegovina ("Bosnia"). All of the six men had lived with their wives and children in Bosnia for several years prior to their arrest.

12. Bosnian authorities arrested Requesters between October 8 and 21, 2001, and held them in pre-trial detention, based on demands relayed by the U.S. Embassy in Sarajevo. All six were either at work or at home with their families when local police asked them to accompany the police for questioning. None has returned home. When neither requests to the United States by the Bosnian government nor the Bosnian government's own 90 day investigation produced any evidence to support the arrests, the highest court of Bosnia, at the recommendation of the Chief Prosecutor, ordered Requesters be released. On January 18, 2002, pursuant to the Bosnian Court's order, Requesters were released from a Bosnian jail; however, despite the Court's order, Requesters were illegally seized by Bosnian and U.S. forces and delivered to the United States military, again, at the instance of the United States Government.

13. Requesters were given rudimentary medical examinations by U.S. forces at Sarajevo and, on information and belief, at a U.S. base in Europe. Throughout two days in transit, they were masked, gagged, and bound hand and foot. Their clothes were taken from them, and they were required to sit on concrete floors in sub-freezing temperatures for hours. On January 19, Requesters were delivered to Guantanamo.

14. Despite more than three years of internment and interrogation, Requesters have not been charged with any offense by the United States or been notified of any pending or contemplated charges.

15. On August 16, 2004, Plaintiff filed an amended petition for writ of *habeas corpus* on behalf of Requesters, and by and through their wives as “next friends,” in the United States District Court for the District of Columbia (Boumediene, et al, No. 04-1166 (RJL)). The petition challenges the legality of the ongoing detention of Requesters. The petition was dismissed on February 18, 2005, and the case is now on appeal before the United States Court of Appeals for the District of Columbia (Docket No. 05-5062).

16. DOD and DOJ have repeatedly and publicly contended that the protections of the Geneva Convention do not apply to Requesters, or to others held at Guantanamo. It is unclear to Plaintiff what policies, if any, are being followed to ensure the safety and humane treatment of Requesters at Guantanamo. Moreover, no documentation has been made available to the public or to Requesters’ families as to whether persecution and torture of Requesters have been investigated or documented – or worse – authorized, overlooked, or acquiesced to, by federal agencies, including Defendants.

17. Plaintiff is aware that Mustafa Ait Idir, one of the Requesters, has been severely beaten and injured during his internment at Guantanamo. Upon information and belief, incident reports, digital or film recordings, medical records, and other records exist at Guantanamo related to some or all of those beatings.

18. On one occasion, Requester Ait Idir was alone in his cell when he was told guards wanted to search his cell. They instructed him to sit on the floor, which he did. The guards

secured his hands behind his back and, while he was so restrained, the guards picked him up and slammed his body and his head into the steel bunk in his cell. They then threw him on the floor and continued to pound his body and bang his head into the floor.

19. The guards picked him up again and banged his head on the toilet in his cell. The guards picked him up again, stuffed Mr. Ait Idir's face in the toilet and repeatedly pressed the flush button. Mr. Ait Idir was starting to suffocate, and he feared he would drown.

20. The guards then carried Mr. Ait Idir outside the cell and threw him on the ground. His hands still were manacled behind his back. They held him down and pushed a garden hose into his mouth. They opened the spigot. As the water rushed in, Mr. Ait Idir began to choke. The water was coming out of his mouth and nose. He could not breathe, and he could not yell to stop or for help. The guards then took the hose out of his mouth and held it approximately 6 to 10 inches in front of his face. He was still being restrained. The water ran full force into his face; he could not breathe. A few days later, he was treated by doctors because of severe bruising all over his body.

21. Requester Ait Idir later was told that the guard who attacked him claimed in a false written report that Mr. Ait Idir had assaulted the guard. Defendants have not provided any such report to Plaintiff.

22. On another occasion, Requester Ait Idir was severely beaten because of his religious beliefs. In early 2004, Mr. Ait Idir and many others were stripped of their pants, which Muslim men must wear for prayers. There were two rows of 24 cells. Guards approached the internee in each cell and demanded that the internee give up his pants. The internees repeatedly told the guards that they could not give up their pants because they would not be able to pray without

them. The guards threatened to take their pants by force if the internees refused to give them up. A special team known as the Immediate Response Force (IRF) was present and available to go into a cell if the internee refused. There were a number of U.S. military officers present.

23. When Mr. Ait Idir was asked for his pants, he explained that he needed to keep them in order to pray. The guards refused his plea and demanded the pants. The reason the guards demanded the pants was to harass the men in their efforts to practice their religion. The guards insisted he could keep only his underwear. Mr. Ait Idir explained that he could not pray in his underwear. A colonel demanded the pants. Mr. Ait Idir offered to give up his pants so long as he could have them back for prayers. The colonel refused.

24. As threatened, the IRF came into Mr. Ait Idir's cell to forcibly remove his pants. He was sprayed in the face with chemical irritant, and one IRF member squeezed Mr. Ait Idir's testicles until he fell to the ground in a fetal position. The IRF members jumped repeatedly on Mr. Ait Idir's body while he was prone and his face was down.

25. After the IRF had secured Mr. Ait Idir's hands behind his back on the ground, and after he was fully under their control, one of the IRF members slowly bent Mr. Ait Idir's fingers back until one of them broke. The pain was excruciating, but Mr. Ait Idir was afraid that if he screamed, the IRF would react by injuring him further. After his finger was broken, he was refused any medical attention, despite his repeated requests.

26. A few days later, guards again came to search his cell. Mr. Ait Idir sat alone in his cell. An officer approached the window opening in his cell door and ordered Mr. Ait Idir to sit on the floor with his hands behind his back. He did so. The officer said that the guards would remove Mr. Ait Idir, search his cell, and then return him to his cell. As he finished speaking, while Mr.

Ait Idir sat on the floor as instructed, the officer sprayed chemical irritant directly into Mr. Ait Idir's face. Two or three guards immediately entered the cell while he was lying on the floor. One forced Mr. Ait Idir's body onto the steel floor of the cell and jumped on his back, using his knees to pound Mr. Ait Idir's body into the floor. The second guard did the same thing. While they had Mr. Ait Idir pinned, the guards secured his hands behind his back.

27. He was carried out and thrown onto the crushed stones that surround the cell building. While Mr. Ait Idir was lying bound on the stones, an IRF member jumped onto the side of Mr. Ait Idir's head with his full body weight, causing extreme pain. Another IRF member climbed onto Mr. Ait Idir's back, and while on his back, the IRF members twisted his middle finger and thumb on his right hand back almost to the point of breaking. Two of his knuckles were dislocated, and he screamed in pain. His middle finger has almost no strength now. He requested and was refused any medical treatment for the permanent injuries inflicted by the guards.

28. Upon information and belief, as a result of that beating, Mr. Ait Idir suffered a stroke. Shortly after that incident, one half of his face became paralyzed. He was in pain. He could not eat normally; food and drink leaked from his non-functioning mouth. Guards teased him because of the condition. Despite visible impairment and his request to go to the hospital, he did not receive medical treatment for ten days. A DOD doctor later diagnosed his condition as "Bell's Palsy." He eventually was given medication and told it would eliminate the symptoms, but not cure him. He continues to experience pain.

29. Upon information and belief, Defendants possess records, including film or digital media recordings of the IRF's actions, relating to the above described conduct and medical condition but have failed and refused to produce them, despite their obligation under 5 U.S.C. § 552 *et seq.*

II. PLAINTIFF'S SEPTEMBER 2004 FOIA REQUEST AND DEFENDANTS' FAILURES TO RESPOND TO THE REQUEST

30. Pursuant to the Freedom of Information Act, on September 28, 2004, Plaintiff requested from Defendants all policies, procedures or guidelines governing conditions of detention, methods of interrogation, or treatment of detainees at Guantanamo (Request 14). The Request also seeks records of investigations relating to conditions of detention or interrogations at Guantanamo (Request 17) and records of any disciplinary actions taken against Guantanamo personnel for deviating from such policies in general (Request 15), or in connection with Requesters (Request 16). Plaintiff also seeks information about physical or psychological conditions used at Guantanamo to elicit cooperation from or to punish Requesters (Requests 11, 13).

31. Plaintiff seeks on behalf of Requesters, certain records known to exist, including Requesters' medical files at Guantanamo (Requests 10, 11); records of interrogations of Requesters (Requests 4, 6, 11); records of punishments or disciplinary actions against Requesters (Request 13); records relating to a visit from Amir Pilav of the Ministry of Justice, Bosnia and Herzegovina, to Guantanamo in July 2004 (Request 5); and records relating to an inspection of conditions of detention at Guantanamo conducted on or about May 6, 2004 by Admiral Church (Request 17). Plaintiff has obtained signed releases of medical records from Requesters. See Attachment B.

32. Plaintiff also seeks information about how and under what conditions Requesters were transferred from Bosnia into U.S. custody (Requests 1, 2, 3, 4). The Request specifically asks for records of all communications regarding Requesters between the United States and the government of Bosnia and Herzegovina (Request 1) and any records of interrogations of Requesters while in the custody of Bosnian authorities (Request 4).

Department of Defense

33. By letter dated October 6, 2004, from C.Y. Talbott, Chief, Office of Freedom of Information and Security Review, DOD, Defense Pentagon, Washington, D.C. 20301-1155, DOD informed Plaintiff that his FOIA request had been received and that his request for expedited processing had been granted. The letter identified Ms. Mary Wahling as the contact person for Plaintiff's request and indicated that Plaintiff would be notified when his request was completed. DOD also provided an internal reference number assigned to Plaintiff's request. See Attachment C.

34. By letter dated November 8, 2004, from Jean Carrillo, Lieutenant, U.S. Navy, Adjutant General, U.S. Southern Command, DOD, Miami, Florida 33172-1217, U.S. Southern Command ("SOUTHCOM"), a component of DOD, informed Plaintiff that his FOIA request had been received from DOD Office of Freedom of Information and Security Review. SOUTHCOM indicated that the Request was being processed and that Plaintiff would have a response soon. SOUTHCOM also provided an internal reference number assigned to Plaintiff's request. See Attachment D.

35. On February 17, 2005, Plaintiff's colleague called Ms. Mary Wahling of DOD by telephone to inquire as to the status of the Request and to determine the date DOD would

produce the records requested. Ms. Wahling said: (1) SOUTHCOM had not provided any records to DOD in Washington, D.C., (2) DOD would not produce responsive records on a rolling basis, and (3) DOD could not estimate when Plaintiff would receive a response to the Request.

36. By letter dated March 4, 2005 Plaintiff informed DOD and SOUTHCOM, that DOD had failed to respond to the Request despite having granted Plaintiff's request for expedited processing. Plaintiff asked DOD immediately to begin production of responsive records, on a rolling basis, and he informed the agency of his intent to file this lawsuit to enforce his right to a timely response under FOIA. See Attachment E.

Department of Justice

37. By letter dated October 22, 2004, Ronald L. Deacon, Director, Facilities and Administrative Services Staff, DOJ, Justice Management Division, Washington, D.C. 20530, informed Plaintiff that his FOIA request had been received by DOJ's receipt and referral unit for FOIA requests. See Attachment F.

38. Plaintiff has received no further information from DOJ regarding the Request.

CAUSES OF ACTION

First Cause of Action:

Violation of FOIA for Failure to Expedite the Processing of Plaintiff's Request

39. Plaintiff incorporates by reference and realleges paragraphs 1-38.

40. Defendants' failure to expedite the processing of Plaintiff's September 28, 2005, request violates FOIA, 5 U.S.C. § 552 (a)(6)(E)(iii), and Defendants' own regulations promulgated thereunder.

Second Cause of Action:
Violation of FOIA for Failure to Make Promptly Available
the Records Sought by Plaintiff's Request

41. Plaintiff incorporates by reference and realleges paragraphs 1-38.

42. Defendants' failure to make promptly available the records sought by the Request violates FOIA, 5 U.S.C. § 552 (a)(3)(A).

Third Cause of Action:
Violation of FOIA for Failure to Timely Respond to Plaintiff's Request

43. Plaintiff incorporates by reference and realleges paragraphs 1-38.

44. Defendants' failure to timely respond to the Request violates FOIA, 5 U.S.C. § 552 (a)(6)(A)(i), and Defendants' own regulations promulgated thereunder.

Fourth Cause of Action:
Violation of FOIA for Failure to Release Records Sought by Plaintiff's Request

45. Plaintiff incorporates by reference and realleges paragraphs 1-38.

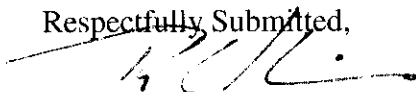
46. Defendants' failures to release records sought by the Request or to make publicly available administrative staff manuals and instructions to staff violates FOIA, 5 U.S.C. § 552 (a).

REQUESTED RELIEF

WHEREFORE, Plaintiff prays that this Court:

- a) ORDER Defendants to process immediately and expeditiously Plaintiff's FOIA request of September 28, 2004, and to disclose the records requested;
- b) EXPEDITE this proceeding as provided for in 28 U.S.C. § 1657;
- c) SET a schedule for producing requested records to Plaintiff;
- d) AWARD Plaintiff his costs and reasonable attorneys fees incurred in this action; and
- e) GRANT such other relief as the Court may deem just and proper.

Respectfully Submitted,



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DATED: April 13, 2005